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Supreme Court, U.S.
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NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2007

TERRY LEE TERRELL,

Petitioner,

VS.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER AN INCORRECT BURDEN OF PROOF (PREPONDERANCE OF THE EVIDENCE) IS BEING APPLIED TO FORFEITURE PROCEEDINGS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioner, Terry Lee Terrell

Respondent, State of Texas

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III. This Court should apply the three factor balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976) to the issue of what level of process is required in a civil forfeiture case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review a final judgment of the Supreme Court of Texas entered in this action on December 21, 2007.

OPINIONS BELOW

The decision in the trial court is not reported.

The decision of the Court of Appeals is reported.

The decision of the Supreme Court of Texas is not reported.

All appellate decisions are contained in the attached Appendix.

BASIS FOR JURISDICTION

The final judgment of the Supreme Court of Texas was entered on December 21, 2007. This Court has jurisdiction to review the final judgment of the Supreme Court of Texas pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Applicable Portion of the Fourteenth Amendment to the United States Constitution:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (the full text of the Fourteenth Amendment is set out in the Appendix)

§ 59.02 Texas Code of Criminal Procedure is set out in the appendix.

§ 59.03 Texas Code of Criminal Procedure is set out in the appendix.

§ 59.04 Texas Code of Criminal Procedure is set out in the appendix.

§ 59.05 Texas Code of Criminal Procedure is set out in the appendix.

STATEMENT OF THE CASE

(i) STATEMENT OF FACTS.

For ease of identification the following will be used throughout this petition:

Petitioner will be called "Terrell"

Respondent will be called the "State."

The facts in this case are:

On February 10, 2006, at 4:25 o'clock p.m., Hon. Roy Sparkman, Presiding Judge of the 78th District Court of Wichita County, Texas, issued a "Seizure Warrant" for the real estate located at 4125 Blanton, Wichita Falls, Texas. (RR 1 R. Ex. 3) Attached to the "Seizure Warrant" was an "Affidavit to Support Seizure" which states that on February 8, 2006 a search and arrest warrant was executed at 4125 Blanton for a Terry Lee Terrell. The Affidavit to

Support Seizure further stated in paragraph 4 that copies of the "search and arrest warrant are attached to and become part of this affidavit for all purposes." However, none of the copies of Affidavit to Support Seizure which are found in the record herein, have any "search and arrest warrant" attached to the Affidavit to Support Seizure (RR 1 R. Ex. 3; Plaintiff's Original Notice of Seizure and Intended Forfeiture at CR - 5; and the First Amended Plaintiff's Original Notice of Seizure and Intended Forfeiture at CR - 14). The Return and Inventory attached to the "Seizure Warrant" reflects that the "Seizure Warrant" was executed at 4:45 on February 10, 2006. (RR 1 D. Ex. 3) On February 10, 2006 at 4:46 o'clock p.m., the State filed a *lis pendens* with the County Clerk of Wichita County, Texas (RR 1 P. Ex. 22). The State filed the Plaintiff's Original Notice of Seizure and Intended Forfeiture at 4:50 o'clock p.m. on February 10, 2006

(CR - 2), alleging that the property in question was seized on February 10, 2006 pursuant to a warrant of seizure on the basis that the said property was contraband and subject to forfeiture. The Plaintiff's Original Notice of Seizure and Intended Forfeiture pleading alleged that the owner of the property is Terry Lee Terrell pursuant to a search of the deed records of Wichita County, Texas. Attached to this pleading was an Affidavit to Support Seizure sworn to on February 10, 2006 by Mickey Fincannon before the Roy Sparkman, Judge of the 78th District Court of Wichita County, Texas. (CR - 5) Citation was served on Terrell on February 13, 2006. (CR - 9) Thereafter, the State filed its First Amended Plaintiff's Original Notice of Seizure and Intended Forfeiture on February 17, 2006 (CR - 11), which was served on Terrell on February 17, 2006. (CR - 18) Terrell filed an Original Answer on March 13, 2006. (CR - 20)

On July 5, 2006 in the 89th District Court of Wichita County, Texas, a bench trial on the merits was held on the seizure of said property. (RR 1)

Of. Spragins testified that a white powder substance was seized during the search from the garage on the east wall on the work bench. (RR 1 - 16 ll. 12 – 17) Of. Spragins stated that he had tested the white powder substance with a NIK field test unit (RR 1 - 16 ll. 18 – 24) and the field test showed the substance to be positive for methamphetamines. (RR 1 - 17 ll. 18 - 19) When asked "Have you had the opportunity to testify in felony cases as to the results of field test units?" Of. Spragins replied, "I have testified that I field tested, yes", yet offered no further response related to his ever testifying as to "results of field test units". (RR 1 - 17 ll.12 – 14) Of. Spragins then identified State's Ex. 1 as a photograph of a coffee filter with a white powder which was the substance

that he testified tested positive for methamphetamine. (RR 1 - 19 ll. 5 – 13)

According to Of. Spragins testimony, the second item seized from the house was a baggy with filters also seized from the east wall on the work bench in the garage which he field tested positive for methamphetamine. (RR. 1- 19 – 20)

In response to the State asking "At some point, Of. Spragins, did you locate a white bucket?", Of. Spragins responded, "There was a white bucket marked as No. 3 on my search and seizure log." (RR 1 - 20 ll. 17 – 20) Of. Spragins went on to testify that inside the bucket was a brown liquid and powder substance which he field tested as positive for methamphetamine. (RR 1 -. 21 ll. 11 – 23).

Of. Spragins next testified that he found a clear plastic container with a blue liquid that he field tested

positive for methamphetamine which was also located on the garage floor (RR 1 - 22 l. 17 – 23 l. 7).

Of. Spragins then identified No. 5 on his search and seizure log as "coleman fuel with liquid". (RR 1 - 24 ll. 8 – 10). Of. Spragins testified that he "PH-ed" this particular item which "PH-ed as a base" so he field tested it for methamphetamine and it was positive for methamphetamine. (RR 1- 24 l. 24 – 25 l. 8)

Of. Spragins then testified that he found an HCL generator at 4125 Blanton (RR. 1 - 26 ll. 12 – 17) which was a plastic container which he field tested with PH paper which showed acid and a dragger pump which was positive for HCL gas. (RR 1 -28 ll. 2 – 10)

Of. Spragins went on to state that he seized a tin box with two baggies of white powder found in the right front pocket of Mr. Terrell by Officer King which

he field tested positive for methamphetamine. (RR. 1 – 29, pp. 12 – 23)

Of. Spragins identified State's Ex. 14 as a "coffee grinder that has a pinkish residue on it" and stated "We tested that and it field tested positive, I believe, for pseudo ephedrine. I don't know if I marked it in my report or not. Let's see. I didn't mark it in there, in my report." (RR 1 – 32 l. 21 – p. 33 l. 5)

Upon cross-examination, Counsel for Petitioner asked Of. Spragins, "if we were in the criminal case today, which we're not, but if we were, we wouldn't be talking with field tests, would we?" to which Of. Spragins responded "No, ma'am." Of. Spragins then agreed that he had field tested substances that when tested by the laboratory had come back with different results (RR 1 - 46 ll. 8 – 11) and a field test only gives an idea but is not 100 percent proof beyond a

reasonable doubt of what the substance is. (RR 1 - 46 ll. 15 – 25)

On further cross examination, Of. Spragins agreed that the document admitted as Respondent's exhibit 1 during such hearing says it is a "search and arrest warrant" not a search and seizure warrant. (RR 1 - 50 ll. 6 – 11) Of. Spragins further agreed that there is nowhere in the search and arrest warrant where it talks about seizing the house and that there was no seizure of the house at that time. (RR 1 - 52 ll. 6 – 12)

At the conclusion of the hearing, the trial court granted the State's request that the Petitioner not be allowed to be at the house but did not ban him from the house giving him access to his personal items (RR 1 - 75 ll. 18 – 22). The Court went on to clarify that the State was not planning on paying the utility bills. (RR 1 - 76 ll. 21 – 22)

(ii) COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

The case was tried to the court and the home of Terrell was ordered forfeited.

The Court of Appeals rendered its Opinion affirming the lower court on July 12, 2007.

The Supreme Court of Texas denied Terrell's Petition for Review on December 21, 2007.

(iii) WHEN AND WHERE PETITIONER RAISED FEDERAL QUESTION:

The Petitioner's complaints regarding the constitutionality of the burden of proof in this Petition for Writ of Certiorari were raised at the court of appeals level as Issue No. Ten. The Court of Appeals opinion incorrectly held that "The State asserts that appellant waived these [seven through eleven] constitutional challenges by failing to present them to the trial court. We agree." The State had argued in

response to issue no. ten as follows: "Appellant argues that the preponderance standard is unconstitutional, and that a 'clear and convincing' standard should instead be used. Appellant's argument is a facial attack on the constitutionality of the statute." At oral argument both the State and Terrell agreed issue ten was a facial attack on the statute's constitutionality. A facial attack on a statute's constitutionality does not have to be raised at the trial court level. *Adams v. State*, 222 S.W.3d 37, 54 (Tex. App. – Austin 2005) The State did not argue that Terrell had waived the issue of an incorrect burden of proof being applied. See Appendix G to this petition where the entirety of the State's argument as to Issue No. Ten has been set out verbatim.

REASONS FOR GRANTING THE WRIT

I. Both the Federal Government and most States have civil forfeiture

statutes in place that utilize the preponderance burden of proof.

II. This Court has never ruled on the proper burden of proof that should be applied in a civil forfeiture case.

III. This Court should apply the three factor balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976) to the issue of what level of process is required in a civil forfeiture case.

IV. This is an appropriate case because Terrell forfeited his home to the State after proof of drugs by only a "field test" which proof is not otherwise permitted in Texas for a conviction or generally for a revocation of probation, a

proceeding conducted under a preponderance standard.

ARGUMENT AND AUTHORITIES

This Court has addressed a handful of cases where it has held that "clear and convincing" is the proper burden of proof and that a preponderance burden is insufficient under the due process requirements of the Fourteenth Amendment. Among these cases are: *Santosky v. Kramer*, 455 U.S. 745 (1982) wherein the issue was the burden of proof necessary to terminate a parent's rights in their biological child; and *Addington v. Texas*, 441 U.S. 418 (1979) wherein the issue was the burden of proof necessary for an indefinite commitment to a state mental hospital relating to an involuntary commitment.

In the context of civil forfeiture, the government (whether state or federal) sets out to take away ownership of private property because of an underlying

criminal enterprise of some nature. Texas Chapter 59 of the Texas Code of Criminal Procedure provides the statutes upon which the government relies to accomplish a civil forfeiture. The taking of private property by the government has always been viewed with suspicion in the constitution and federal laws, hence the Fourteenth Amendment specifically providing that due process must be afforded prior to loss of a private property interest and 42 U.S.C. §§ 1981-1983 which likewise provide for a civil rights deprivation if property is taken without due process. "Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471 (1972) This Court developed a three factor test in the case of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) which "requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk

of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

In matters involving governmental forfeiture of private property one begins with the fundamental ownership rights of the private individuals to their property, whether real or personal. This right has been recognized and protected from the Bill of Rights to the present and embodied in the Fourteenth Amendment, Fifth Amendment and statutes such as the "civil rights" statutes of the reconstruction era found in 42 U.S.C. §§ 1981-1983. When the State seeks to deprive a person of their property, it must

provide that person with fundamentally fair procedures.

In any given case the minimum standard of proof called for by due process calls for a balancing of the weight of the public and private interest acted upon by the court as well as a balancing of the distribution of possible risk of error occurring between the public and the private interests.

These important concerns are classically addressed by this court and yet in the context of civil forfeiture have not been so addressed.

In an era that encourages governmental entities to forfeit private property, there is an increased potential for risk and abuse to develop.

This particular case illustrates well the common threads that are found in these cases and typifies the types of cases that the individual states and the federal government are addressing daily.

The case is a common drug case and the loss of property involves the home of the Petitioner. The issue is whether a preponderance of the evidence standard provides a sufficient level of due process under the Fourteenth Amendment.

The balance of the private interest of property ownership weighs heavily against a preponderance standard because the private interest is commanding and the threatened loss is permanent.

A preponderance burden does not fairly divide the risk of an erroneous decision between the government and the property owner. Acknowledging that these civil forfeiture statutes are civil and remedial in nature, there is still the distinct underlying requirement of criminal conduct to support the forfeiture and accordingly it cannot be ignored that these cases have a distinct criminal component necessary for the forfeiture to be granted.

The preponderance standard allocates the risk of error nearly equally between the parties without regard for the severity of forfeiture being granted and its affect if wrongly decided on the private individual and the relative comfort of the government regardless of the outcome. The damage, if forfeiture is granted, is all on the side of the private citizen, and little, if any, damage to the government, if the requested relief is denied, can be found.

Consequently, there is a strong argument that upon an evaluation and balancing of civil forfeiture being made by this court, that the court will find that a higher burden than preponderance is mandated by the due process clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-06-389-CV

REAL PROPERTY LOCATED AT 4125 BLANTON, WICHITA FALLS, WICHITA COUNTY, TEXAS, WITH A LEGAL DESCRIPTION OF LOT 1 BLOCK 4 UNIVERSITY PARK B1, WICHITA COUNTY, TEXAS	APPELLANT
V.	
THE STATE OF TEXAS	APPELLEE

FROM THE 89TH DISTRICT COURT
OF WICHITA COUNTY

OPINION

I. Introduction

Appellant Terry Lee Terrell appeals the seizure of his real property pursuant to chapter 59 of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. arts. 59.01-.14 (Vernon 2006). In fifteen issues, appellant challenges the validity and

constitutionality of the seizure and the legal and factual sufficiency of the evidence supporting the conclusion that the seizure was proper. We affirm.

II. Background Facts

On February 8, 2006, acting on information received from a confidential informant, officers from the North Texas Regional Drug Enforcement Task Force sought, received, and executed a search and arrest warrant on appellant at 4125 Blanton, in Wichita Falls, Texas, the property which is the subject of this case ("Blanton Property"). During their search, the officers found appellant inside the residence and conducted field tests for drugs on a bag with filters, a white bucket containing a brown liquid, and a clear container with blue liquid. After receiving positive results for methamphetamine, the officers arrested appellant and seized equipment commonly used for producing drugs, containers holding the methamphetamine, and other drug paraphernalia. Appellant was charged with manufacturing an illegal substance in a drug free zone.[1]

Following the search, the State filed an Original Notice of Seizure and Intended Forfeiture

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[1] [fn1] The property is located within one thousand feet of Cunningham Elementary School. *See* TEX. HEALTH & Safety Code Ann. § 481.134(b)(1) (Vernon Supp. 2006).

and a Notice of Lis Pendens in the 89th District Court of Wichita County against the Blanton Property on February 10, 2006, asserting that the property met the definition of "contraband," that appellant was the owner, and that the property should be forfeited to the State of Texas under article 59.06 of the code of criminal procedure. TEX. CODE CRIM. PROC. ANN. art. 59.06. Subsequently, the trial court issued a "seizure warrant" for the Blanton Property.

After a bench trial, the trial court concluded that the Blanton Property was contraband and ordered that all of appellant's interest in it be forfeited to the State of Texas. This appeal followed.

III. Validity of the Warrant

In his first issue, appellant asserts that the warrant authorizing the seizure of the Blanton Property was defective because it was entitled "seizure warrant" instead of "search and seizure" warrant.

A. Applicable Law

Property subject to forfeiture under chapter 59 of the Texas Code of Criminal Procedure may be seized under the authority of a "search warrant." *Id.* art. 59.03(a); *State v. Thirty Thousand Six Hundred Sixty Dollars*, 136 S.W.3d 392, 397 (Tex.App.-Corpus

Christi 2004, pet. denied). A "search warrant" in Texas is defined as a "written order, issued by a magistrate and directed to a peace officer, commanding him to search for any property or thing and to seize the same." TEX. CODE CRIM. PROC. ANN. art. 18.01(a) (Vernon 2005); *Mulder v. State*, 707 S.W.2d 908, 915 (Tex.Crim.App. 1986). Specifically, the four general requirements for a valid search warrant are as follows:

> (1) that it run in the name of "The State of Texas";
>
> (2) that it identify, as near as may be that which is to be seized and name or describe, as near as may be, the person, place, or thing to be searched;
>
> (3) that it command any peace officer of the proper county to search forthwith the person, place, or thing named; and
>
> (4) that it be dated and signed by the magistrate

TEX. CODE CRIM. PROC. ANN. art. 18.04; *State v. Manry*, 56 S.W.3d 806, 809 (Tex.App.-Texarkana 2001, no pet.). Further, the substantive requirements for a search warrant are as follows:

> A search warrant may not be issued . . . unless the sworn affidavit required by Subsection (b) of this article sets forth sufficient facts to establish probable cause that a specific felony offense has been committed and that the specifically described property or items

> that are to be searched for or seized constitute contraband as defined in Article 59.01 of this code and are located at or on the particular person, place, or thing to be searched.

TEX. CODE CRIM. PROC. ANN. art. 18.01(g); *see Tolentino v. State*, 638 S.W.2d 499, 501 (Tex.Crim.App. 1982); *$18,800 in U.S. Currency v. State*, 961 S.W.2d 257, 260 (Tex.App.-Houston [1st Dist.] 1997, no writ). Thus, a search warrant may be issued to search for *and seize* "contraband subject to forfeiture under chapter 59" of the code of criminal procedure. Tex. Code Crim. Proc. Ann. art. 18.02(12); *Wall v. State*, 878 S.W.2d 686, 688 (Tex.App.-Corpus Christi 1994, pet. ref'd); *see Winkles v. State*, 634 S.W.2d 289, 291 (Tex.Crim.App. [Panel Op.] 1981). Real property that has been used in the commission of a felony in violation of chapter 481 of the Health and Safety Code, the Texas Controlled Substance Act, is contraband subject to forfeiture. Tex. Code Crim. Proc. Ann. art. 59.01(2)(B)(i); Tex. Health & Safety Code Ann. ch. 481 (Vernon 2003 & Supp. 2006); *One 1995 Dodge Pickup v. State*, 119 S.W.3d 306, 307 (Tex.App.-Waco 2003, no pet.). Methamphetamine is a controlled substance, and possession of it is a felony. Tex. Health & Safety Code Ann. §§ 481.102(6), 481.115; *One 1995 Dodge Pickup*, 119 S.W.3d at 307.

B. Analysis

Appellant contends that the warrant issued to seize the Blanton Property, entitled "seizure warrant," was not sufficient to satisfy the criteria described above. Specifically, he asserts that because the words "seizure warrant" do not appear in Texas case law in isolation from "search and seizure warrant," the warrant here was invalid. We disagree.

First, the warrant meets the general requirements of a warrant under article 18.04. The warrant itself identifies the property to be seized, and the affidavit, which was incorporated into the warrant, also sufficiently identifies the Blanton Property. The warrant is dated and signed by a magistrate and runs in the name of "The State of Texas." The warrant specifically orders the police officers to seize the real property located at 4125 Blanton, Wichita Falls, Texas, within three days of the warrant's issuance. Thus, the four general requirements of a warrant were satisfied. *See* TEX. CODE CRIM. PROC. ANN. art. 18.04; *Manry*, 56 S.W.3d at 809.

The warrant and accompanying affidavit also meet the substantive requirements for seizure of contraband. The affidavit accompanying the warrant specifically described the results of the search that occurred two days earlier. The affidavit also included descriptions of the amount and type of drug

paraphernalia discovered in the search and the conclusion of the police officers that the real property was being used as contraband. Thus, the affidavit contained sufficient facts to establish probable cause that a specific offense had been committed and that the described property constituted contraband. See TEX. CODE CRIM. PROC. ANN. art. 18.01(g); *$18,800 in U.S. Currency*, 961 S.W.2d at 260.

Appellant argues that the seizure warrant is defective because its title, "seizure warrant," is not recognized under article 59.03.[2] While the term "search" was not included in the title of the warrant, the substance of the warrant indicates that it was issued properly. *See Green v. State*, Page 482 799 S.W.2d 756, 757 (Tex.Crim.App. 1990) (stating that the two objectives of the law concerning search warrants are to ensure that there is adequate probable cause to search and to prevent a mistake in the execution of the warrant against an innocent third party). Moreover, we generally are to look to the substance of a warrant to determine its purpose as opposed to its title. *Manry*, 56 S.W.3d at 809.

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[2] The original search and arrest warrant established the proof necessary to issue the subsequent seizure warrant for the seizure of the real property in compliance with article 59.03. *See State v. Anderson*, 917 S.W.2d 92, 99-100 (Tex.App. - Houston [14th Dist.] 1996, pet. ref'd) (holding that personal knowledge gained by a police officer from a previous search may establish probable cause necessary for second search warrant if affidavit sets forth sufficient underlying facts).

In this case, the substantive components of the warrant were in compliance with the statutory requirements, and any technical discrepancy in the title should not cause it to be deemed defective. *See id.* (stating that technical discrepancies are reviewed with a judicious eye for the procedural aspects surrounding issuance and execution of the warrant); *State v. Tipton*, 941 S.W.2d 152, 155 (Tex.App.-Corpus Christi 1996, pet. ref'd) (stating that ministerial violations of the search warrant statutes do not vitiate a search warrant in the absence of a showing of prejudice). Accordingly, we overrule appellant's first issue.

IV. Whether a Seizure Occurred

In his second issue, appellant asserts that no seizure occurred because he was permitted to occupy the property for over-three days after the seizure in violation of article 59.03 of the code of criminal procedure.

Article 59.03(c) governs the custody status and proper procedures regarding seized property. TEX. CODE CRIM. PROC. ANN. art. 59.03(c). Specifically, article 59.03(c) provides,

> A peace officer who seizes property under this chapter has custody of the property, subject only to replevy under Article 59.02 of this code *or an order of a*

> *court*. . . . Not later that 72 hours after the seizure, the peace officer shall:
>
> (1) place the property under seal;
>
> (2) remove the property to a place ordered by the court; or
>
> (3) require a law enforcement agency of the state or a political subdivision to take custody of the property and move it to a proper location.

Id. (emphasis added); *State v. Silver Chevrolet Pickup*, 140 S.W.3d 691, 694 (Tex. 2004).

In summary, even if an officer seizes property, a court may order the property to be returned to the custody of a party. *See* TEX. CODE CRIM. PROC. ANN. art. 59.03(c); *One Hundred Ninety-One Thousand Four Hundred Fifty-Two Dollars v. State*, 827 S.W.2d 430, 432 (Tex.App.-Corpus Christi 1992, writ denied). When a court issues such an order, there is nothing within the statute indicating that the validity of the seizure is affected. Appellant has also not cited any contrary authority. The legislature cannot have intended for an order altering the custody of the property to affect the validity of a seizure under article 59.03(c) because the same article specifically allows for such an order. TEX. CODE CRIM. PROC. ANN. art. 59.03; *see id.* art. 59.01(8) (defining "seizure" as the restraint of property by force or by a display of the officer's authority, and includes taking possession of property); *Silver Chevrolet Pickup*, 140 S.W.3d at 694 (stating that seizure means the restraint of property by a peace officer under article 59.03 whether the officer restrains the property by physical force or by a display of the officer's authority); *In re K.L.V.*, 109 S.W.3d 61, 65-66 (Tex.App.-Fort Worth

2003, pet. denied) (stating that statutes will not be interpreted in a manner that leads to an absurd result when another alternative is available and the cardinal rule of statutory construction requires that each sentence, clause, phrase, and word be given effect if reasonably possible).

In this case, the "seizure warrant" that authorized the seizure of the property specifically provided that the peace officer was "further **ORDERED** to allow only the owner of said property TERRY LEE TERRELL to remain and to occupy the premises aforementioned in this warrant." Such a warrant is proper. *See* TEX. CODE CRIM. PROC. ANN. art. 59.03(c); *One Hundred Ninety-One Thousand Four Hundred Fifty-Two Dollars*, 827 S.W.2d at 432. Accordingly, we overrule appellant's second issue.

V. Appellant's Constitutional Challenges

In his third and fourth issues, appellant contends that because the warrant and subsequent seizure were invalid, the seizure violated his due process rights under the Fifth and Fourteenth Amendments of the United States Constitution and under article I, section 19 of the Texas Constitution. Because we have concluded that the warrant was valid despite its title and that the proper procedures were followed in executing the seizure, appellant's due process rights under federal and state law were not violated. *See Ramos v. State*, 934 S.W.2d 358, 362-63 (Tex.Crim.App. 1996) (holding that evidence obtained from valid search warrant did not violate constitutional due process provisions), *cert. denied*, 520 U.S. 1198, 117 S.Ct. 1556, 137 L.Ed.2d 704 (1997); *Phenix v. State*, 488 S.W.2d 759, 767

Tex.Crim.App. 1973) (stating that seizure conducted within parameters of a valid search warrant did not violate defendant's constitutional rights where officers acted in accordance with procedural guidelines). Accordingly, we overrule appellant's third and fourth issues.

In his fifth and sixth issues, appellant contends that the method of seizure violated the constitutional provisions prohibiting ex post facto laws found in article I, section 10, clause 1 of the U.S. Constitution and article I, section 16 of the Texas Constitution.[3] Ex post facto prohibitions apply to civil statutes only when the statutory scheme is so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. *See Rodriguez*, 93 S.W.3d at 67 (holding that the legislature's manifest intent will be rejected only where the party challenging the statute provides the clearest proof that the statute is actually criminally punitive in operation).

Forfeitures under chapter 59 of the code of criminal procedure are civil, in rem proceedings against property rather than against the defendant and are not normally classified as punishment. *See* TEX. CODE CRIM. PROC. ANN. art. 59.05(e); *Font v. State*, 931 S.W.2d 299, 307 (Tex.Crim.App. 1996); *Thirty Thousand Six Hundred Dollars*, 136 S.W.3d

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[3] An ex post facto law (1) punishes as a crime an act previously committed which was innocent when done, (2) changes the punishment and inflicts a greater punishment than the law attached to a criminal offense when committed, or (3) deprives a person charged with a crime of any defense available at the time the act was committed. *Collins v. Youngblood*, 497 U.S. 37, 42-44, 110 S.Ct. 2715, 2719-20, 111 L.Ed.2d 30 (1990); *Ex parte Davis*, 947 S.W.2d 216, 219-20 (Tex.Crim.App. 1996); *Rodriguez v. State*, 93 S.W.3d 60, 66-67 (Tex.Crim.App. 2002).

at 413 (stating that the forfeiture provisions of chapter 59 are remedial, not punitive). Thus, the ex post facto clauses of the federal and state constitutions are inapplicable here. *See Fant*, 931 S.W.2d at 307. Accordingly, we overrule appellant's fifth and sixth issues.

In his seventh through eleventh issues, appellant asserts that the forfeiture of the property violates the Excessive Fines Clause of the Eighth Amendment and article I, section 13 of the Texas Constitution, that article I, section 21 of the Texas Constitution entitles appellant to strict construction and strict compliance with chapter 59 of the code of criminal procedure, and that an incorrect burden of proof was applied to the forfeiture proceedings in violation of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and article I, section 19 of the Texas Constitution.

The State asserts that appellant waived these constitutional challenges by failing to present them to the trial court. We agree. To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if they are not apparent from the context of the request, objection, or motion. TEX.R.APP. P. 33.1(a); *see also* TEX.R. EVID. 103(a)(1). If a party fails to do this, error is not preserved, and the complaint is waived. *Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991) (op. on reh'g).

Appellant never presented issues eight, ten, or eleven to the trial court or asserted them in his motion for new trial. He asserted issues seven and nine for the first time in his motion for new trial; these issues were untimely presented. Therefore, he waived these constitutional issues. *See Dreyer v.*

Greene, 871 S.W.2d 697, 698 (Tex. 1993) (holding that a claim, including a constitutional claim, must have been asserted to the trial court to be raised on appeal); *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (stating fundamental error in civil trials survives today in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected); *Loera v. Interstate Inv. Corp.*, 93 S.W.3d 224, 228 (Tex.App.-Houston [14th Dist.] 2002, pet. denied) (holding that claims raised by appellant for first time in motion for new trial were untimely and therefore waived).Accordingly, we overrule appellant's seventh through eleventh issues.

VI. Testing of Methamphetamine

In his twelfth issue, appellant contends that the proof of methamphetamine under the health and safety code cannot be made by field tests alone, and, therefore, the evidence was insufficient to establish the identity of an illegal substance. However, field tests have been used to meet the minimum burden of proof as evidence of the presence of illegal drugs. *See Gabriel v. State*, 900 S.W.2d 721, 722 (Tex.Crim.App. 1995); *Smith v. State*, 874 S.W.2d 720, 722 (Tex.App.-Houston [1st Dist.]), *pet. ref'd*, 887 S.W.2d 948 (Tex.Crim.App. 1994). Therefore, we overrule appellant's twelfth point.[4]

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[4] We address the sufficiency argument on the field test in the next section.

VII. Sufficiency of the Evidence

In his thirteenth through fifteenth issues, appellant argues that the evidence is legally and factually insufficient to support the forfeiture judgment. Specifically, appellant contends that there was insufficient evidence to establish that the property was contraband and that the subsequent seizure was valid.

A. Standards of Review

A legal sufficiency challenge may only be sustained when: (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998), *cert. denied*, 526 U.S. 1040, 119 S.Ct. 1336, 143 L.Ed.2d 500 (1999); Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362-63 (1960). In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could, and disregard evidence contrary to the finding unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

An assertion that the evidence is factually insufficient to support a fact finding means that the evidence supporting the finding is so weak or the evidence to the contrary is so overwhelming that the

answer should be set aside and a new trial ordered. *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965). We are required to consider all of the evidence in the case in making this determination, not just the evidence that supports the finding. *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex), *cert. denied* 525 U.S. 1017, 119 S.Ct. 541, 142 L.Ed.2d 450 (1998).

Findings of fact entered in a case tried to the court have the same force and dignity as a jury's answers to jury questions. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). The trial court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them by the same standards that are applied in reviewing evidence supporting a jury's answer. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996); *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). When findings of fact are filed and are unchallenged, they occupy the same position and are entitled to the same weight as the verdict of a jury; they are binding on an appellate court unless the contrary is established as a matter of law, or if there is no evidence to support the finding. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986); *Raman Chandler Props., L.C. v. Caldwell's Creek Homeowners Ass'n, Inc.*, 178 S.W.3d 384, 390 (Tex.App.-Fort Worth 2005, pet. denied). Conclusions of law may not be challenged for factual sufficiency, but they may be reviewed to determine their correctness based upon the facts. *Citizens Nat'l Bank v. City of Rhome*, 201 S.W.3d 254, 256 (Tex.App.-Fort Worth 2006, no pet.); *Dominey v. Unknown Heirs & Legal Representatives of Lokomski* 172 S.W.3d 67, 71 (Tex.App.-Fort Worth 2005, no pet.).

The trial court issued forty-two findings of fact and eighteen conclusions of law. Appellant has not challenged findings of fact one, four, seven, nine, ten, eleven. fourteen, sixteen, nineteen, twenty-one, or thirty-two or conclusions of law four, five, or eight.

B. Analysis

We previously discussed the validity of the seizure warrant and the procedures taken during the seizure of the property and determined that both were proper under articles 18 and 59 of the code of criminal procedure, respectively. Appellant has not offered any additional evidence to suggest the procedures or requirements of the code of criminal procedure were not properly followed. Therefore, findings of fact two, three, five, six, twelve, eighteen, thirty-nine, forty, and forty-one and conclusions of law one, six, fifteen, and eighteen were supported by sufficient evidence. We now turn to appellant's additional evidentiary complaints.

Article 59 requires that forfeiture proceedings be commenced no later than thirty days after the seizure. TEX. CODE CRIM. PROC. ANN. art. 59.04(a); *State v. Lot 10, Pine Haven Estates*, 900 S.W.2d 400, 401 (Tex.App.-Texarkana 1995, no writ). Appellant contends that the seizure, forfeiture, and filing of the lis pendens were simultaneously done in violation of article 59.04, which, according to appellant, mandates that the property must first be seized before the lis pendens is filed and forfeiture proceedings begin. *See* TEX. CODE CRIM. PROC. ANN. art. 59.04(a), (g). We disagree with appellant's interpretation of article 59.04. There is nothing in the statute, and appellant has provided no relevant law or discussion, indicating that the simultaneous

filing of these documents is improper. *See Bochas v. State*, 951 S.W.2d 64, 70 (Tex.App.-Corpus Christi 1997, pet. denied) (holding that forfeiture of real property may be adjudicated before the seizure occurs because real property cannot abscond).

Appellant also challenges the findings of fact and conclusions of law that a certified copy of the notice of seizure and intended forfeiture was filed by the State and served on appellant. However, appellant failed to provide any evidence or relevant analysis to support his challenge. Therefore, we conclude that the requirements of article 59.04 were satisfied, and findings of fact eight, thirteen, fifteen, and seventeen and conclusions of law two, three, and seven were supported by sufficient evidence.

Appellant also argues that the evidence was insufficient to establish that methamphetamine was being manufactured and stored on the property. However, in the February 8, 2006 search of the property, officers found several types of drug paraphernalia and several items that field-tested positive as methamphetamine. At trial, Officer John Spragins, an investigator with the North Texas Regional Drug Enforcement Task Force, testified that he was on the team that searched appellant's house. Officer Spragins stated that he had over seven years of experience as a narcotics investigator, had investigated "200 to 300" methamphetamine labs, and had received specialized training in recognizing and investigating methamphetamine production.

When asked about the search of appellant's property, Officer Spragins testified that he found a filter containing a white powder substance on a work bench in appellant's garage. Officer Spragins used an "NIK field test unit" to field test the powder, and the powder tested positive as methamphetamine.

According to Officer Spragins, he had used field test units "[t]housands of times." Officer Spragins also found a bag with filters, a white bucket containing a brown liquid, and a clear container with blue liquid; all tested positive for methamphetamine. Further, Officer Spragins found a metal fuel can, an "HCL generator" containing sulfuric acid and salt, digital scales, a pill grinder, a coffee grinder with pink residue inside of it, distillation tubes, Sudafed packaging, syringes, and glass pipes with burn residue, all of which are items commonly found in methamphetamine laboratories. Officer Spragins found "a tin box with two baggies of white powder" in appellant's right front pocket; the powder tested positive as methamphetamine.

According to Officer Spragins, based on the equipment and total weight of methamphetamine found, 1,295.5 grams, "it was obvious to me that [appellant] was manufacturing methamphetamine and distributing methamphetamine" at his home. Neither at trial nor in this appeal did appellant present any alternative theory as to what the equipment was used for or what the powder and liquid substances were. Thus, the evidence was legally and factually sufficient to prove and show that methamphetamine was being manufactured and stored on the property in violation of chapter 481 of the health and safety code. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102, 481.115. Findings of fact twenty-five, twenty-six, twenty-eight, and thirty-seven and conclusion of law twelve were supported by sufficient evidence.

Appellant also challenges the trial court's findings of fact and conclusion of law that the testimony of Officer Spragins that drugs were found on the property and that the property was located

within one thousand feet of an elementary school was true and credible and unchallenged by the defense. However, appellant did not to object to Officer Spragins' testimony regarding his conclusions from the field tests, did not offer any evidence that disparaged the accuracy of the field tests, and did not challenge or object to the location of the property in relation to a public elementary school.[5] Thus, findings of fact twenty-seven, thirty-three, thirty-four, and thirty-eight and conclusion of law thirteen were supported by sufficient evidence.

Appellant also challenges several of the findings of fact and conclusions of law indicating that he was the only person with an interest in the property. Evidence introduced at trial, however, included appellant's testimony that he was the sole owner of the property and that no other person had an interest in the property. Further, appellant testified that he lived at 4125 Blanton, that he paid the bills and utilities there, and that he did not pay rent on the property to anyone else.

Appellant also challenges the finding of fact indicating he did not file a disclaimer of interest as to the property within the statutory period of time. However, appellant failed to offer any evidence to support his conclusion. Therefore, we conclude that findings of fact twenty, twenty-two, twenty-three, twenty-nine, thirty, and thirty-one and conclusions of law nine and ten were supported by sufficient evidence.

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[5] The State introduced evidence placing the property within a drug-free zone. *See* TEX. HEALTH & Safety Code Ann. § 481.134.

Appellant also challenges the finding of fact and conclusion of law that narcotics and narcotic paraphernalia were found on the property. Appellant argues that the term "narcotic" by definition refers to a different category of drugs. Significantly, the word "narcotic," is often used to mean a drug prohibited by law. BLACK'S LAW DICTIONARY 1049 (8th ed. 2004); *see Hollis v. State*, 219 S.W.3d 446, 467 (Tex.App.-Austin 2007, no pet.) (using the term narcotic" to describe all types of drugs, including methamphetamine); *Lee v. State*, 143 S.W.3d 565, 567 (Tex.App.-Dallas 2004, pet. ref'd)(same), *cert. denied*, ___ U.S. ___, 126 S.Ct. 2978, 165 L.Ed.2d 986 (2006).

The health and safety code defines "narcotic drug" as opium and opiates and a salt, compound, derivative, or preparation of opium or opiates. TEX. HEALTH & SAFETY CODE ANN. § 481.002(29)(A). "Opiate" is defined as a substance that has an addiction-forming or addiction-sustaining liability similar to morphine or is capable of conversion into a drug having addiction-forming or addiction-sustaining liability. *Id.* § 481.002(30). Thus, methamphetamine could be classified as a narcotic because of its addiction-forming liability. *See id.* § 481.032 (Schedule II) (describing methamphetamine as having a potential for abuse); *Rivera v. State*, No. 02-05-056-CR, 2006 WL 743030, at *2 n. 4 (Tex.App.-Fort Worth Mar.23, 2006, pet. ref'd) (not designated for publication) (referring to the National Institute on Drug Abuse, The Science of Drug Abuse & Addiction, Methamphetamine, http://www.nida.nih.gov/drugpages/methamphetamine.html (last visited July 11, 2007) (describing methamphetamine as addictive)); *In re W.D.W.*, 173 S.W.3d 607, 610 (Tex.App.-Dallas 2005, no pet.) (describing party's

addiction to methamphetamine); *In re K.C.P.*, 142 S.W.3d 574, 581 (Tex.App.-Texarkana 2004, no pet.) (describing appellant as a methamphetamine addict).

Also, the forms of narcotic drugs defined by the statute are grouped in the same penalty group as methamphetamine; thus, the substances carry the same offenses for possession or manufacture of the illegal drugs. TEX. HEALTH & SAFETY CODE ANN. §§ 481.002(29), 481.102, 481.112.

During trial and in its findings of fact and conclusions of law, the trial court referred to the drugs found at appellant's residence as both narcotics and methamphetamine. Because the trial court used the terms "narcotic" and "methamphetamine" interchangeably, and because, in this case, both terms referred to the illegal substance found in appellant's house, finding of fact twenty-four and conclusion of law eleven were supported by sufficient evidence.

Appellant also challenges the finding of fact and conclusion of law that he failed to offer and prove an affirmative defense. Appellant claims this finding was an attempt to switch the burden of proof in the case. However, appellant failed to offer any evidence of an affirmative defense or any relevant analysis supporting this conclusion. Appellant also challenges the finding of fact and conclusion of law that his due process rights were not violated. However, we previously determined that appellant's due process rights were not violated during the seizure. Consequently, findings of fact thirty-six and forty-two and conclusions of law fourteen and seventeen were supported by sufficient evidence.

Finally, appellant challenges the finding of fact and conclusion of law that the trial court took an adverse inference from his assertion of his Fifth

Amendment right against self-incrimination. However, appellant failed to provide any evidence, relevant analysis, or legal theory to support this statement. Consequently, finding of fact thirty-five and conclusion of law sixteen were supported by sufficient evidence.

After a careful review of the record, we conclude that the evidence offered at trial was legally and factually sufficient to establish that the property was contraband and that the seizure was valid. *See City of Keller*, 168 S.W.3d at 827; *Garza*, 395 S.W.2d at 823. Accordingly we overrule appellant's thirteenth, fourteenth, and fifteenth issues.

VIII. Conclusion

Having overruled appellant's fifteen issues, we affirm the trial court's judgment.

TERRIE LIVINGSTON
JUSTICE

PANEL B: LIVINGSTON, WALKER, AND MCCOY, JJ.
DELIVERED: July 12, 2007

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No.07-0739 DATE: 12/21/2007
COA#: 02-06-00389-CV TC# 163,818-C
STYLE: REAL PROPERTY LOCATED AT 4125 BLANTON, WICHITA COUNTY, TEXAS, WITH A LEGAL DESCRIPTION OF LOT 1 BLOCK 4 UNIVERSITY PARK B1, WICHITA COUNTY, TEXAS
v. THE STATE OF TEXAS

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MAIL TO:
MS. HOLLY CRAMPTON
CRAMPTON & CRAMPTON
505 LAMAR AVENUE
WICHITA FALLS TX 76301

United States Constitution
Amendment V. Criminal actions – Provisions concerning – Due process of law and just compensation.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution Amendment XIV

§ 1. Citizenship — Due process of law — Equal protection.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof; are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Representatives — Power to reduce apportionment.

Representatives Shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. Disqualification to hold office.

No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house remove such disability.

§ 4. Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. Power to enforce amendment.

The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Art. 59.05 CODE CRIM. P. Forfeiture hearing

(a) All parties must comply with the rules of pleading as required in civil suits.

(b) All cases under this chapter shall proceed to trial in the same manner as in other civil cases. The state has the burden of proving by a preponderance of the evidence that property is subject to forfeiture.

(c) It is an affirmative defense to forfeiture under this chapter of property belonging to the spouse of a person whose Acts gave rise to the seizure of community property that, because of an act of family violence, as defined by Section 71.004, Family Code, the spouse was unable to prevent the act giving rise to the seizure.

(d) A final conviction for an underlying offense is not a requirement for forfeiture under this chapter. An owner or interest holder may present evidence of a dismissal or acquittal of an underlying offense in a forfeiture proceeding, and evidence of an acquittal raises a presumption that the property or interest that is the subject of the hearing is nonforfeitable. This presumption can be rebutted by evidence that the owner or interest holder knew or should have known that the property was contraband.

(e) It is the intention of the legislature that asset forfeiture is remedial in nature and not a form of punishment. If the court finds that all or any part of the property is subject to forfeiture, the judge shall forfeit the property to the state, with the attorney representing the state as the agent for the state, except that if the court finds that the nonforfeitable

interest of an interest holder in the property is valued in an amount greater than or substantially equal to the present value of the property, the court shall order the property released to the interest holder. If the court finds that the nonforfeitable interest of an interest holder is valued in an amount substantially less than the present value of the property and that the property is subject to forfeiture, the court shall order the property forfeited to the state with the attorney representing the state acting as the agent of the state, and making necessary orders to protect the nonforfeitable interest of the interest holder. On final judgment of forfeiture, the attorney representing the state shall dispose of the property in the manner required by Article 59.06 of this code.

(f) On forfeiture to the state of an amount greater than $2,500, the clerk of the court in which the forfeiture proceeding was held is entitled to court costs in that proceeding as in other civil proceedings unless the forfeiture violates federal requirements for multijurisdictional task force cases authorized under Chapter 362, Local Government Code. The procedure for collecting the costs is the procedure established under Subsections (a) and (c), Article 59.06.

(g) If property is seized at a federal checkpoint, the notice of seizure and intended forfeiture may be filed in and the proceeding may be held in:

(1) the county in which the seizure occurred; or

(2) with the consent of the owner, operator, or agent in charge of the property, a county that is adjacent to the county in which the seizure occurred, if both counties are in the same judicial district.

Art. 59.02 CODE CRIM. P. Forfeiture of contraband

(a) Property that is contraband is subject to seizure and forfeiture under this chapter.

(b) Any property that is contraband other than property held as evidence in a criminal investigation or a pending criminal case, money, a negotiable instrument, or a security that is seized under this chapter may be replevied by the owner or interest holder of the property, on execution of a good and valid bond with sufficient surety in a sum equal to the appraised value of the property replevied. The bond may be approved as to form and substance by the court after the court gives notice of the bond to the authority holding the seized property. The bond must be conditioned:

(1) on return of the property to the custody of the state on the day of hearing of the forfeiture proceedings; and

(2) that the interest holder or owner of the property will abide by the decision that may be made in the cause.

(c) An owner or interest holder's interest in property may not be forfeited under this chapter if the owner or interest holder proves by a preponderance of the evidence that the owner or interest holder acquired and perfected the interest:

(1) before or during the act or omission giving rise to forfeiture or, if the property is real property, he acquired an ownership interest, security interest, or lien interest before a lis pendens notice was filed under Article 59.04(g) of this code and did not know or should not reasonably have known of the act or

omission giving rise to the forfeiture or that it was likely to occur at or before the time of acquiring and perfecting the interest or, if the property is real property, at or before the time of acquiring the ownership interest, security interest, or lien interest; or

(2) after the act or omission giving rise to the forfeiture, but before the seizure of the property, and only if the owner or interest holder:

(A) was, at the time that the interest in the property was acquired, an owner or interest holder for value; and

(B) was without reasonable cause to believe that the property was contraband and did not purposefully avoid learning that the property was contraband.

(d) Notwithstanding any other law, if property is seized from the possession of an owner or interest holder who asserts an ownership interest, security interest, or lien interest in the property under applicable law, the owner or interest holder's rights remain in effect during the pendency of proceedings under this chapter as if possession of the property had remained with the owner or interest holder.

(e) On motion by any party or on the motion of the court, after notice in the manner provided by Article 59.04 of this code to all known owners and interest holders of property subject to forfeiture under this chapter, and after a hearing on the matter, the court may make appropriate orders to preserve and maintain the value of the property until a final disposition of the property is made under this chapter, including the sale of the property if that is

the only method by which the value of the property may be preserved until final disposition.

(f) Any property that is contraband and has been seized by the institutional division of the Texas Department of Criminal Justice shall be forfeited to the institutional division under the same rules and conditions as for other forfeitures.

(g) An individual, firm, corporation, or other entity insured under a policy of title insurance may not assert a claim or cause of action on or because of the policy if the claim or cause of action is based on forfeiture under this chapter and, at or before the time of acquiring the ownership of real property, security interest in real property, or lien interest against real property, the insured knew or reasonably should have known of the act or omission giving rise to the forfeiture or that the act or omission was likely to occur.

(h)(1) An owner or interest holder's interest in property may not be forfeited under this chapter if at the forfeiture hearing the owner or interest holder proves by a preponderance of the evidence that the owner or interest holder was not a party to the offense giving rise to the forfeiture and that the contraband:

(A) was stolen from the owner or interest holder before being used in the commission of the offense giving rise to the forfeiture;

(B) was purchased with:

(i) money stolen from the owner or interest holder; or

(ii) proceeds from the sale of property stolen from the owner or interest holder; or

(C) was used or intended to be used without the effective consent of the owner or interest holder in the commission of the offense giving rise to the forfeiture.

(2) An attorney representing the state who has a reasonable belief that property subject to forfeiture is described by Subdivision (1) and who has a reasonable belief as to the identity of the rightful owner or interest holder of the property shall notify the owner or interest holder as provided by Article 59.04.

(3) An attorney representing the state is not liable in an action for damages resulting from an act or omission in the performance of the duties imposed by Subdivision (2).

(4) The exclusive remedy for failure by the attorney representing the state to provide the notice required under Subdivision (2) is submission of that failure as a ground for new trial in a motion for new trial or bill of review.

(i) The forfeiture provisions of this chapter apply to contraband as defined by Article 59.01(2)(B)(v) of this code only in a municipality with a population of 250,000 or more.

Art. 59.03 CODE CRIM. P. Seizure of contraband

(a) Property subject to forfeiture under this chapter, other than property described by Article 59.12, may

be seized by any peace officer under authority of a search warrant.

(b) Seizure of property subject to forfeiture may be made without warrant if:

(1) the owner, operator, or agent in charge of the property knowingly consents;

(2) the seizure is incident to a search to which the owner, operator, or agent in charge of the property knowingly consents;

(3) the property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter; or

(4) the seizure was incident to a lawful arrest, lawful search, or lawful search incident to arrest.

(c) A peace officer who seizes property under this chapter has custody of the property, subject only to replevy under Article 59.02 of this code or an order of a court. A peace officer who has custody of property shall provide the attorney representing the state with a sworn statement that contains a schedule of the property seized, an acknowledgment that the officer has seized the property, and a list of the officer's reasons for the seizure. Not later than 72 hours after the seizure, the peace officer shall:

(1) place the property under seal;

(2) remove the property to a place ordered by the court; or

(3) require a law enforcement agency of the state or a political subdivision to take custody of the property and move it to a proper location.

(d) A person in the possession of property at the time a peace officer seizes the property under this chapter may at the time of seizure assert the

person's interest in or right to the property. A peace officer who seizes property under this chapter may not at the time of seizure request, require, or in any manner induce any person, including a person who asserts an interest in or right to the property seized, to execute a document purporting to waive the person's interest in or rights to the property.

Art. 59.04 CODE CRIM. P. Notification of forfeiture proceeding

(a) If a peace officer seizes property under this chapter, the attorney representing the state shall commence proceedings under this section not later than the 30th day after the date of the seizure.

(b) A forfeiture proceeding commences under this chapter when the attorney representing the state files a notice of the seizure and intended forfeiture in the name of the state with the clerk of the district court in the county in which the seizure is made. The attorney representing the state must attach to the notice the peace officer's sworn statement under Article 59.03 of this code or, if the property has been seized under Article 59.12(b), the statement of the terms and amount of the depository account or inventory of assets provided by the regulated financial institution to the peace officer executing the warrant in the manner described by Article 59.12(b). Except as provided by Subsection (c) of this article, the attorney representing the state shall cause certified copies of the notice to be served on the following persons in the same manner as provided for the service of process by citation in civil cases:

(1) the owner of the property; and

(2) any interest holder in the property.

(c) If the property is a motor vehicle, and if there is reasonable cause to believe that the vehicle has been registered under the laws of this state, the attorney representing the state shall ask the Texas Department of Transportation to identify from its records the record owner of the vehicle and any interest holder. If the addresses of the owner and interest holder are not otherwise known, the attorney representing the state shall request citation be served on such persons at the address listed with the Texas Department of Transportation. If the citation issued to such address is returned unserved, the attorney representing the state shall cause a copy of the notice of the seizure and intended forfeiture to be posted at the courthouse door, to remain there for a period of not less than 30 days. If the owner or interest holder does not answer or appear after the notice has been so posted, the court shall enter a judgment by default as to the owner or interest holder, provided that the attorney representing the state files a written motion supported by affidavit setting forth the attempted service. An owner or interest holder whose interest is forfeited in this manner shall not be liable for court costs. If the person in possession of the vehicle at the time of the seizure is not the owner or the interest holder of the vehicle, notification shall be provided to the possessor in the same manner specified for notification to an owner or interest holder.

(d) If the property is a motor vehicle and is not registered in this state, the attorney representing the state shall attempt to ascertain the name and address of the person in whose name the vehicle is

licensed in another state. If the vehicle is licensed in a state that has a certificate of title law, the attorney representing the state shall request the appropriate agency of that state to identify the record owner of the vehicle and any interest holder.

(e) If a financing statement is required by law to be filed to perfect a security interest affecting the property, and if there is reasonable cause to believe that a financing statement has been filed, the attorney representing the state who commences the proceedings shall ask the appropriate official designated by Chapter 9, Business & Commerce Code, to identify the record owner of the property and the person who is an interest holder.

(f) If the property is an aircraft or a part of an aircraft, and if there is reasonable cause to believe that a perfected security instrument affects the property, the attorney representing the state shall request an administrator of the Federal Aviation Administration to identify from the records of that agency the record owner of the property and the holder of the perfected security instrument. The attorney representing the state shall also notify the Department of Public Safety in writing of the fact that an aircraft has been seized and shall provide the department with a description of the aircraft.

(g) If the property is real property, the attorney representing the state, not later than the third day after the date proceedings are commenced, shall file a lis pendens notice describing the property with the county clerk of each county in which the property is located.

(h) For all other property subject to forfeiture, if there is reasonable cause to believe that a perfected security instrument affects the property, the attorney representing the state shall make a good faith inquiry to identify the holder of the perfected security instrument.

(i) Except as provided by Section (c) of this article, the attorney representing the state who commences the proceedings shall cause the owner and any interest holder to be named as a party and to be served with citation as provided by the Texas Rules of Civil Procedure.

(j) A person who was in possession of the property at the time it was seized shall be made a party to the proceeding.

(k) If no person was in possession of the property at the time it was seized, and if the owner of the property is unknown, the attorney representing the state shall file with the clerk of the court in which the proceedings are pending an affidavit stating that no person was in possession of the property at the time it was seized and that the owner of the property is unknown. The clerk of the court shall issue a citation for service by publication addressed to "The Unknown Owner of _____," filling in the blank space with a reasonably detailed description of the property subject to forfeiture. The citation must contain the other requisites prescribed by and be served as provided by Rules 114, 115, and 116, Texas Rules of Civil Procedure.

(*l*) Proceedings commenced under this chapter may not proceed to hearing unless the judge who is to

conduct the hearing is satisfied that this article has been complied with and that the attorney representing the state will introduce into evidence at the hearing any answer received from an inquiry required by Subsections (c)-(h) of this article.

"Reply Point 2 to Issues 10 and 11

Appellant's Issues 10 and 11 should be overruled because he has not satisfied his arduous burden in his facial attack upon the constitutionality of Tex. Code Crim. Proc. Art. 59.05(b) and upon well-established judicial precedent.

Argument for Reply Point 2 to Issues 10 and 11

In Issues 10 and 11 of his brief, Appellant argues that an incorrect burden of proof is being applied to forfeiture proceedings in Texas, which violates provisions of the U.S. and Texas Constitutions.

Tex. Code Crim. Proc. Art. 59.05(b) states that all cases of forfeiture under Chapter 59 'shall proceed to trial in the same manner as in other civil cases. The state has the burden of proving by a preponderance of the evidence that property is subject to forfeiture.' Appellant argues that the

preponderance standard is unconstitutional, and that a 'clear and convincing' standard should instead be used. Appellant's argument is a facial attack on the constitutionality of the statute.

To successfully challenge the facial constitutionality of a statute, an appellant must show that the statute always operates unconstitutionally. *FM Props. Operating Co. v. City of Austin,* 22 S.W.3d 868, 900 (Tex. 2000). In other words, the appellant must demonstrate that ' no set of circumstances exists under which the Act would be valid.' *See Wilson v. Andrews,* 10 S.W.3d 663 (Tex. 1999). This is certainly a heavy burden.

Texas courts have consistently noted and upheld the civil nature of Chapter 59 forfeiture proceedings, and the preponderance standard. See *Fant v. State,* 931 S.W.2d 299, 307 (Tex. Crim. App. 1996); *Ex parte Baucom,* 928 S.W.2d 748, 752 (Tex.

App. – Beaumont 1996, pet. ref'd) (stating that 'the civil nature of the Texas forfeiture statute is clearly established'); *Twenty-Four Thousand One Hundred & Eighty Dollars v. State*, 865 S.W.2d 181, 188 (Tex. App. – Corpus Christi 1993, writ denied) (expressly finding that the 'clear and convincing' standard does not apply to Chapter 59 forfeiture cases).

Appellant cites *Addington v. Texas*, 441 U.S. 418, 425-431 (1979), as his principal support for arguing that the burden of proof for Chapter 59 forfeitures should be the 'clear and convincing' standard. While *Addington* does contain a lengthy discussion on burdens of proof, its holding regards the standard of proof for civil commitments, and makes no mention of property forfeitures. In this case, Appellant has cited no authority and has not adequately explained in his argument why the elevated standard for a facial attack on Tex. Code

Crim. Proc. Art. 59.05(b) has been satisfied. Specifically, Appellant has not demonstrated in any way how 'no set of circumstances exists under which the Act would be valid.' *See Wilson v. Andrews*, 10 S.W.2d 663 (Tex. 1999). For these reasons, this Court should overrule Appellant's Issues 10 and 11.

Further, even if this court were to decide that art. 59.05(b) is in fact unconstitutional, and that the clear and convincing standard should be used, Appellant has not explained in his argument on Issues 10 and 11 how the use of that elevated standard would affect the resolution of this case. For this reasons as well, this Court should overrule these Issues, and affirm the judgment of the trial court."

42 U.S.C. § 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.